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No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

Brief of Amicus Curiae City of Boston in Support of Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented.

The question set forth in the Petition for Certiorari is as follows:

Does a municipality have a constitutional duty, arising under the Eighth Amendment, to pay the medical expenses of a felony suspect injured while being apprehended by the police?

The subsidiary questions fairly subsumed by that question are:

1. Does the Eighth Amendment to the United States Constitution govern treatment of criminal suspects during police custody, prior to any conviction?

2. Does the United States Constitution's guarantee that those in official custody receive needed medical care require that payment for such care be supplied by the arresting jurisdiction itself, rather than by the health care provider?

3. Does a hospital which has provided emergency medical care to a person in police custody have standing to raise that person's constitutional right to receive needed medical care when:

(a) the hospital's only claimed injury lies in the arresting jurisdiction's refusal to provide reimbursement for the medical care provided; and

(b) there is no apparent threat to the rights of those in police custody to receive needed medical care?

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Brief of Amicus Curiae City of Boston in Support of Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Interest of the Amicus Curiae.

The decision below threatens the City of Boston[1] and other cities in the Commonwealth of Massachusetts with new and significant financial liabilities. Criminal suspects in police custody, prior to arraignment, frequently require medical

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[1] This brief is sponsored by the authorized law officer of Boston, a political subdivision of the Commonwealth of Massachusetts. Accordingly, no consent to the filing of this brief is necessary. Supreme Court Rule 36.4.

care, whether as the result of a fight, a driving accident, serious intoxication, an injury inflicted by the police in the course of arrest, or some other cause. Proper police practice requires that needed medical care be provided to such persons. Hospitals with emergency facilities are often the nearest and most appropriate sources of such care. In the past, when Boston police have called on hospitals to provide care to people in police custody, Boston has not paid for the medical services provided. Indeed Boston, like cities in the Commonwealth generally, has no appropriation set aside or intended for such expenses. Propelled by law and custom alike, hospitals have provided such services as needed regardless of whether payment has been assured. As a result of the decision below, however, it is predictable that hospitals will submit bills for such services on a regular basis and, if such bills are not paid voluntarily, will bring suit to compel payment by the municipality involved. Indeed, in the several months that have elapsed since the decision below, Boston has received a substantial bill for services, and another suit has been filed by Massachusetts General Hospital (MGH) against the City of Chelsea to recover payment for medical services provided to a fugitive from Rhode Island shot by a Rhode Island trooper. *Massachusetts General Hospital* v. *City of Chelsea*, Boston Municipal Court docket No. 20810.

The decision below also puts pressure on Boston to modify its practices with respect to medical care in ways that may, ironically, *reduce* the quality of care provided to those in police custody. A requirement that every city pay, upon request, for services provided by hospitals, yields an incentive to develop rules directing the police to use municipal or other publicly controlled hospitals to the extent feasible, since such hospitals will presumably not request payment from the city for their services. Those in need of medical care may, as a result, be deprived of the opportunity to be treated at the nearest or otherwise most appropriate medical facility.

The decision below poses other, less obvious, threats. It rests on the novel and radical proposition that, because the federal Constitution provides those in custody some right to needed medical care, the courts should intervene to make the policy decision as to *who should pay for that care*. No question was posed in this case as to the substantive right to care. The police did everything appropriate to ensure that the suspect Kivlin received care by calling an ambulance and having him delivered to MGH. MGH in turn provided appropriate care, undeterred by the absence of any principal or practice that would require the City of Revere to pay for such care. There is no reason to believe that police and hospitals in Massachusetts will not generally continue to act in precisely the same way in the future, regardless of whether cities are required to pay for the services provided. See p. 9 and note 12 *infra*. The court below evidently concluded, on some unarticulated basis, that it was more appropriate as a policy matter for cities than for hospitals to pay for services provided to indigent criminal suspects in circumstances such as those in this case. However this funding issue should be resolved, it seems clear that the relevant considerations have nothing whatever to do with the concerns embodied in the Eighth Amendment's prohibition against cruel and unusual punishment, or in the related prohibition of the Due Process Clause of the Fourteenth Amendment. The decision below thus stands as an open invitation to state and federal courts to invoke the United States Constitution in support of their preferred solutions to a wide variety of funding and other policy problems that bear no more than a peripheral relationship to substantive constitutional mandates.

Accordingly, Boston submits this brief in support of the Petition for Certiorari herein.

Statement of the Case.

Amicus relies on the Statement of the Case set forth in the Petition, but wishes to emphasize in addition the following facts.

The decision below rests on the proposition that cities have an Eighth Amendment duty not only to ensure needed medical care for those in police custody, but to reimburse the principal provider for such care.

The decision would apply regardless of the *reason* that care is needed. Thus, the court below made no finding that the injury requiring treatment was the result of police misconduct — nor would the evidence in this record have supported any such finding.[2] Nor, indeed, did the court below even rely on the fact that the police *caused* the injury: the decision's rationale would be no less applicable had the suspect injured himself or been injured by a third party.

The decision below found no basis in state law for requiring Revere to pay the medical expenses at issue. Indeed the court found that Massachusetts law *prohibited* finding an express or implied contract for Revere to pay for the services rendered under the circumstances of this case, as well as for recovery on any *quantum meruit* theory. The decision herein relied solely on the Eighth Amendment as the source of the novel duty of a city to pay for medical services provided free of charge by a hospital.

The state's highest court was on entirely new ground, unsupported by any precedent in this Court or elsewhere, in holding that the federal Constitution required Revere not

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[2] Under certain circumstances, Massachusetts law authorizes the use of deadly force to effect an arrest. *See Commonwealth* v. *Klein*, 372 Mass. 823, 363 N.E.2d 1313 (1977); *Julian* v. *Randazzo*, Mass. Adv. Sh. (1980) 965, 403 N.E.2d 931 (1980). There is no suggestion in this case that those circumstances were not satisfied or that the conduct of the police was in any other respect unlawful or improper.

simply to ensure that those in police custody received needed medical services, but, in addition, to pay the hospital for providing those services. The court's only rationale for this novel constitutional theory is contained in one wholly conclusory, 20-word passage; "To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services rendered." 385 Mass. 772, 779, 434 N.E.2d 185, 189 (1982).

Absolutely nothing in the opinion below or in the record of this case supports the notion that a criminal suspect's right to medical care would in any way be endangered by a decision that entities other than Revere should continue to be responsible for funding such care, or that the reallocation of fiscal responsibilities decreed by the court below would serve in any degree to better ensure the availability or quality of medical care in situations like these.

Reasons for Granting the Writ.

I. The Supreme Judicial Court's Holding That the Eighth Amendment Governs Conditions of Police Custody Prior to Conviction is in Conflict With This Court's Decisions.

The court below held that the Eighth Amendment defined Revere's obligations to provide medical care to those in the custody of its police. The court looked to *Estelle* v. *Gamble*[3] as establishing the appropriate standard, quoting *Estelle's* command that government refrain from "deliberate indifference to serious medical needs of prisoners."[4]

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[3] 429 U.S. 97 (1976).

[4] *Id.* at 104. *See Massachusetts General Hospital* v. *Revere*, 385 Mass. 772, at 777, 434 N.E.2d 185, at 188 (1982).

That holding conflicts squarely with several recent decisions of this Court, which have made clear that the rights of persons in official custody prior to criminal conviction, or in a non-criminal context, are governed *not* by the Eighth Amendment, but by the Due Process Clause of the Fifth and the Fourteenth Amendments.[5]

The distinction this Court has drawn is one of substance, designed to secure rights and obligations in the post-conviction context distinct in kind from those applicable in other custodial situations. Thus, after conviction, the Eighth Amendment operates to limit the *kind* of punishment that can be imposed, preventing the infliction of penalties that cannot be

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[5] *Ingraham* v. *Wright*, 430 U.S. 651 (1977), held the Eighth Amendment inapplicable to corporal punishment in schools on the ground that the Amendment was designed solely to limit *criminal* punishment: "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Id.* at 671 n.40. The Court ruled that it was the Due Process Clause of the Fourteenth Amendment that established the limits on punishment where there had been no such adjudication. *Id.* In *Bell* v. *Wolfish*, 441 U.S. 520, 535 & n.16 (1979), the Court held that due process, rather than the Eighth Amendment, governs conditions of confinement for pretrial detainees. And in *Youngberg* v. *Romeo*, 102 S.Ct. 2452 (1982), the Court held that due process, rather than the Eighth Amendment, governs conditions of confinement for mentally retarded persons who have been civilly committed.

Several federal courts of appeals have likewise held that it is due process, rather than the Eighth Amendment, that guarantees pretrial detainees the right to needed medical care. See *Norris* v. *Frame*, 585 F.2d 1183 (3d Cir. 1978); *Loe* v. *Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. den. sub nom. Moffitt* v. *Loe*, 446 U.S. 928 (1980). *See also Duran* v. *Elrod*, 542 F.2d 998 (7th Cir. 1976) (due process rather than Eighth Amendment governs general conditions of custody of pretrial detainees); *Fitzke* v. *Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972) (substantive due process governs pretrial detainees' rights to medical care; no discussion of Eighth Amendment's applicability). *Contra*, *Fielder* v. *Bosshard*, 590 F.2d 105 (5th Cir. 1979) (applying Eighth Amendment analysis to pretrial detention, without considering substantive due process).

justified as serving legitimate penological purposes.[6] Where there has been no conviction, criminal punishment is not authorized *at all*, so the Eighth Amendment's ban on "cruel and unusual" punishments is simply inapplicable. Instead, substantive due process operates to protect the "liberty" interests of those in official custody, and requires that custodial conditions be justified by legitimate state goals that the custody in question is designed to serve. Punishment, whether humane or cruel, could not constitute such a goal.[7]

Although this Court has established these basic principles, it has only begun to hint at what they may imply for the constitutionality of specific conditions of confinement in various custodial contexts. Inevitably, the task of drawing out these implications will, at least in the first instance, be left primarily to state courts and to the lower federal judiciary. It is, therefore, essential that the courts understand the distinction in principle. No court should be allowed to assume, as did the court below, that standards established in Eighth Amendment cases such as *Estelle* v. *Gamble* can simply be transposed unthinkingly to all custodial situations.

Rights to medical care may well be different, and more extensive, when no criminal conviction exists to justify the custody at issue. Thus, in *Youngberg* v. *Romeo*,[8] this Court found that mentally retarded persons who had been civilly committed enjoy rights to affirmative treatment and services going beyond any rights that could be justified in the name of the Eighth Amendment's ban on "deliberate indifference." The Court held in *Youngberg* that the district court in that case had erred in applying the *Estelle* standard,[9] and held,

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[6] *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976).

[7] *Bell* v. *Wolfish*, 441 U.S. at 535 & n.16.

[8] 102 S.Ct. 2452 (1982).

[9] *Id.* at 2456 n.11; 2460.

further, that substantive due process required the state to provide, in addition to adequate medical care, such training as professionals would consider reasonable in order to ensure safety and facilitate freedom from needless bodily restraints.[10]

The Court should grant certiorari in order to clarify the important differences in principle between the conditions of confinement that are constitutionally authorized in situations of police custody, and those authorized for post-conviction incarceration. Alternatively, the Court may wish to consider summary disposition, remanding for reconsideration in light of the precedents so plainly ignored by the court below.

II. The Supreme Judicial Court's Novel and Insupportable Theory That the United States Constitution Requires an Arresting Jurisdiction Not Only to Ensure That Those Within Police Custody Receive Needed Medical Care, but Also to Pay for Such Care, Raises Issues of Federalism and Separation of Powers Calling for Resolution by This Court.

In finding that the federal Constitution required that Revere itself pay for medical care needed by and provided to those in police custody, the court below took an important — and an unwarranted — step beyond previous definitions of the duty to ensure needed medical care.

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[10] *Id.* For federal courts of appeals decisions indicating that substantive due process may provide for a different and more extensive right to medical care in the pretrial detention situation, see *Norris* v. *Frame*, *supra*, 585 F.2d at 1186-88 (involving right to continue methadone treatment); *Duran* v. *Elrod*, *supra* (substantive due process provides more stringent standard for pretrial detainee conditions than Eighth Amendment does for post-conviction conditions); *Loe* v. *Armistead*, *supra* (finding substantive due process "at least as co-extensive as the guarantees of the eighth amendment," in a case defining pretrial detainees' right to medical care).

There is no issue in this case as to the *substantive right to receive care*. The police acted promptly to ensure that Kivlin receive appropriate treatment, and MGH provided it without question or delay, both before and after the City of Revere refused to pay the hospital's bill.[11] There is every reason to believe that future suspects in police custody will continue to be treated this way, regardless of who pays the bill. A combination of laws, constitutional and common law doctrines, and official regulations and policies governing the police and hospitals, provide extensive assurances that those in police custody will receive needed medical care.[12]

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[11] Although the court below asserted that holding Revere liable to MGH was necessary "to ensure Kivlin's right to medical care," 385 Mass. at 779, 434 N.E.2d at 189, the record leaves no doubt that this right was fully protected by what the police and MGH did as soon as Kivlin was injured. Moreover, despite Revere's refusal to pay MGH for the emergency service it had rendered to Kivlin, the record shows that MGH later admitted him for additional treatment, valued at $5,300.41. 385 Mass. at 773 n.5, 434 N.E.2d at 186 n.5.

[12] For example, the Boston Police Rules and Regulations clearly contemplate that the police will obtain appropriate treatment for a person injured in the course of arrest. Thus, Rule No. 203, "Handling Accident Victims and Emergency Medical Assistance" (June 4, 1979), requires a policeman to wait for an ambulance rather than transport a victim to the hospital himself, and specifies that "[p]ersons taken into custody by the police, who require emergency medical treatment, should be transported in accordance with this rule." Rule No. 318, "Prisoners Amended" (Jan. 1982), requires that, when a prisoner is assisted to a hospital, a memorandum of any search shall be made (§ 14); that, when a prisoner is unconscious for any cause, the officer in charge shall endeavor to restore consciousness and summon medical assistance (§ 16); that any unusual appearance shall receive immediate attention (*id.*); and that a female prisoner needing immediate medical attention shall be taken to a hospital rather than the House of Detention after being booked (§ 37).

Federal courts have recently made it clear that the Due Process Clause of the Fourteenth Amendment imposes a duty to provide medical care to persons confined prior to trial. See note 5 *supra*. See also *Hughes* v. *Noble*, 295 F.2d 495 (5th Cir. 1961); *Coleman* v. *Johnston*, 247 F.2d 273 (7th Cir. 1957);

Nor is there any issue in this case as to whether an arrested suspect has a right to receive needed care *free of charge*. Kivlin

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Green v. *Cauthen*, 379 F. Supp. 361, 369 (D. S.C. 1974); *Mullins* v. *City of River Rouge*, 338 F. Supp. 26 (E.D. Mich. 1972). *See generally* Comment, the Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pre-trial Detainees, 42 U. Chi. L. Rev. 705 (1975). Police are presumably subject to this duty from the time someone enters into their custody. For cases dealing specifically with police custody in an on-the-street situation, *see, e.g.*, *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (federal constitutional duty to provide medical care to suspect shot during arrest); *White* v. *Rochford*, 592 F.2d 381, 383 (7th Cir. 1979) (stating, in dictum, that police denial of needed medical care to someone in custody would violate substantive due process, and holding that police have an affirmative duty to lend aid to innocent bystanders "endangered by the performance of official duty").

Further, all hospitals in Massachusetts with a certified emergency unit are required by statute to provide services to all requiring them, without discrimination on account of source of payment or economic status. Mass. Gen. Laws Ann. c. 111 § 70E(k) (West 1982). Hospitals refusing to provide treatment would be subject by statute to malpractice liability. Mass. Gen. Laws Ann. c. 111, § 70E and c. 231, § 60B-E (West 1982). In other states, the courts have developed common law doctrines imposing comparable obligations on hospitals with emergency facilities. *See, e.g.*, *Guerrero* v. *Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975); *Wilmington General Hospital* v. *Manlove*, 54 Del. 235, 174 A.2d 135 (1961); *Mercy Medical Center of Oshkosh, Inc.* v. *Winnebago County*, 58 Wis. 2d 260, 206 N.W.2d 198 (1973). And the literature indicates that the courts now generally recognize a duty to provide emergency care without regard to ability to pay (or any other factor besides need for care). *See, e.g.*, Dougherty & Dougherty, Moral Reconstruction in the Hospital: A Legal and Philosophical Perspective on Patient Rights, 14 *Creighton L. Rev.* 1409, 1410-11 (1981); Ficarra, The Hospital Emergency Room and the Law, 12 *Cal. W. L. Rev.* 223, 236 (1976); G. Annas, *The Rights of Hospital Patients* 37 (1975); Powers, Hospital Emergency Service and the Open Door, 66 *Mich. L. Rev.* 1455, 1462-63, 1485-86 (1968).

Moreover, general public welfare provisions provide for financial assistance for needy persons requiring medical care. See Mass. Gen. Laws Ann. c. 118E (West 1982). And federal regulations prescribe that hospitals that have received grants under the Hill-Burton Act, c. 958, § 601 et seq., 60 Stat. 1041 (1946), codified at 42 U.S.C. § 291 (1976), must supply a reasonable amount of free care to indigents for at least 20 years, 42 U.S.C. § 291c(e), 42 C.F.R. § 124.503(a). Hospitals that received or will receive

has received such care. MGH's suit was solely against the City of Revere; Revere's third-party complaint against Kivlin was dismissed by the trial judge when he dismissed MGH's complaint and entered judgment for Revere.[13]

The sole issue is whether Revere should be responsible for reimbursing MGH for the treatment provided. In resolving this issue, the court below sailed into a realm of policy making having nothing at all to do with the interests that the federal Constitution was designed to protect.

In a recent Florida decision, an appellate court rejected a lower court's attempt similarly to allocate responsibility for payment in order to achieve certain policy objectives.[14] There the police had arranged transportation to the hospital for two men who had injured each other in a knife fight. The lower court held the county liable to the hospital for the treatment provided. The appellate court reversed, finding that, since the men had not been in police custody, state law imposed on the county no obligation to pay. In language quite applicable to the decisions below, the appeals court ruled that the lower court's decision was an inappropriate way to further its presumed policy objectives:

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aid under Title XVI of the Public Health Service Act must provide such care indefinitely. 42 U.S.C. 300o-3(b)(1)(J). Furthermore, any hospital assisted by either program is required to make *emergency* care available to all, regardless of ability to pay. 42 C.F.R. § 124.603(b)(1). In addition, the standards promulgated by the Joint Commission on Accreditation of Hospitals, published in the Accreditation Manual for Hospitals, provide that:

> Any individual who comes to the hospital for emergency medical evaluation or initial treatment shall be properly assessed by qualified individuals and appropriate services shall be rendered within the defined capability of the hospital.

[13] 385 Mass. at 774; 434 N.E.2d at 186.

[14] *Dade County* v. *Hospital Affiliates International, Inc.*, 378 So.2d 43 (Fla. Dist. Ct. App. 1979).

> The lower court's conclusion was apparently based on the "public policy" that hospitals should be encouraged to treat emergency patients. But, it is for the legislature, and not the courts, to devise the means by which that end, however desirable, should be achieved. 10 Fla. Jur.2d Constitutional Law § 147 (1979). In Sec. 401.45, Fla.Stat. (1977), the legislature has required licensed hospitals like the appellee to provide treatment to all persons who require it on an emergency basis. Moreover, such facilities may be required to respond in damages if they fail to discharge that duty. See, e.g., *Hunt* v. *Palm Springs General Hospital, Inc.*, 352 So.2d 582 (Fla. 3d D.C.A. 1977). Even if mere humanitarian considerations were not enough, these very practical factors provide sufficient motivation for a hospital to admit needy persons who require its care. It was therefore unnecessary and improper to attempt to encourage this result by requiring the taxpayers, rather than the appellee itself, to discharge this obligation by extending the county's responsibility beyond that imposed by Sec. 951.23.

378 S.2d at 46 n.5.

The decision below takes a step beyond any federal or state court precedent known to *amicus*. This Court, certainly, has never indicated that the duty to provide needed medical care includes anything more than a duty to ensure that such care is in fact provided. The underlying rationale for the constitutional duty, set forth in *Estelle* v. *Gamble*,[15] is that if the state deprives a person of the ability to care for himself, then it must provide needed care so as to avoid subjecting him to pointless suffering.[16] This rationale leaves open the question of whether

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[15] 429 U.S. 97 (1976).

[16] *Id.* at 103.

the state has any duty to pay for care in a situation in which care will in any event be provided, either because the individual has access to resources, or because health care providers recognize an obligation to provide treatment free of charge to the individual — treatment for which the providers may be reimbursed pursuant to various state and federal health and welfare programs. However this Court might resolve the question of payment *as between the state and the individual in custody* in different situations,[17] there seems no basis for using the federal Constitution to allocate responsibility *as between the state and the providers of health care.*

The only cases known to *amicus* that have dealt with the issue in this case — whether health care providers have a right to reimbursement by the state — have treated it as a question of state policy, to be resolved by looking to state legislation and common law doctrines. No court has found, as did the court below, that the federal Constitution mandates payment by the state regardless of state law and policy to the contrary.

Some courts have denied health care providers any right to reimbursement, relying on the absence of statutes authorizing payment.[18] Courts that have found a right to reimbursement

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[17] The complexity of this question demonstrates that it should not be resolved implicitly — without careful consideration of the issues. Thus, vis-a-vis the individual, the state's obligation to pay might well depend on such factors as whether it has deprived the individual of the opportunity to earn a living; whether the medical treatment is truly needed or is optional; whether the need results from state action or from the individual's own actions; and who, if anyone, is at fault.

[18] *Windham Community Memorial Hospital* v. *City of Willimantic*, 166 Conn. 113, 348 A.2d 651 (1974) (city had no obligation to pay for treatment provided to person injured during arrest, because city had no statutory authority to contract for such treatment); *Trinity Hosp. Assoc.* v. *City of Minot*, 76 N.W.2d 916 (N.D. 1956) (same); *King County* v. *City of Seattle*, 70 Wash. 2d 988, 425 P.2d 887 (1967) (*en banc*) (no statute or court rule imposed any duty on sheriff beyond delivering city prisoners to hospital).

have relied on state law apparently authorizing payment and/or on the existence of a contract, actual or implied, between the health care provider and the state for the services rendered.[19] The question of whether the state has a duty to provide needed medical care is often determinative of the state law contract issue because, under the general common law rule, an implied contract will be found where the person requesting services for a third party has a legal obligation to provide such services.[20] Some courts have found such a duty in state law,[21] and one court other than that below, in the Eighth Amendment.[22] Even in that one case, however, the court relied on the Eighth Amendment simply as establishing the duty to provide care; it relied solely on state law to create an implied contract to pay for services sought out pursuant to that duty. Other courts have made clear that the duty to ensure that medical care is obtained does not necessarily mean that, as a matter of state law, an obligation to pay will also be im-

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[19] *Lamar* v. *Board of Commissioners of Pike Cty.*, 4 Ind. App. 191, 30 N.E. 912 (1892); *Miller* v. *County of Dickinson*, 68 Iowa 102, 26 N.W. 31 (1885); *Dodge City Medical Center* v. *Board of County Commissioners in Gray County*, 6 Kan. App. 2d 731, 634 P.2d 163 (1982); *Mt. Carmel Medical Center* v. *Board of County Commissioners of Labette County*, 1 Kan. App. 2d 374, 566 P.2d 384 (1977); *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 294-95, 281 N.W. 2d 786, 788 (1979); *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926); *Hospital Services, Inc.* v. *Dumas*, 297 N.W.2d 320 (N.D. 1980); *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okla. 1955).

[20] *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 295, 281 N.W.2d 786, 788 (1979), citing *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926).

[21] *Lamar* v. *Board of Commissioners of Pike Cty.*, *supra* n.19; *Miller* v. *County of Dickinson*, *supra* n.19; *Mt. Carmel Medical Center* v. *Board of County Commissioners of Labette County*, *supra* n.19; *Spicer* v. *Williamson*, *supra* n.19; *City of Tulsa* v. *Sisler*, *supra* n.19; *Dodge City Medical Center* v. *Board of County Commissioners in Gray County*, *supra* n.19.

[22] *See Lutheran Medical Center* v. *City of Omaha*, *supra* n.19; see also *Dade County* v. *Hospital Affiliates, International, Inc.*, *supra* n.14 (dictum).

plied.[23] The Supreme Judicial Court, having found that state law rules out any kind of contract under the circumstances of this case, stands alone in finding that the federal Constitution's guarantee of medical care itself includes a state or municipal duty to pay for such care vis-a-vis the health care provider.

State legislatures have traditionally chosen among a variety of approaches to the problem of ensuring needed health care to those in custody, and to the problem of paying for medical services provided to the indigent. Thus Massachusetts legislation once provided for payment by cities for services in circumstances like those in this case;[24] was later amended to provide for payment by the Commonwealth;[25] and was then repealed[26] when the Legislature enacted comprehensive public welfare provisions which included medical care in their coverage.[27] The federal government and the various states have at various times developed many different programs to provide reimbursement for hospitals such as MGH, when they provide care free of charge to indigents.

The holding below would constitutionalize all such decisions, forcing courts to decide, as a matter of federal constitutional law, who should pay in a wide variety of situations. This Court either should grant certiorari to clarify the line between constitutional adjudication and legislative policy mak-

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[23] Thus, in *King County* v. *City of Seattle*, *supra* n.18, the court held that, although the sheriff had a duty to ensure that city prisoners were provided with needed medical care, including hospitalization if appropriate, there was *no* duty to reimburse the county hospital, which had a statutory obligation to admit free of charge patients who could not pay for treatment.

[24] Mass. Gen. Laws Ann. c. 117, § 24A (West 1969), as added by Stat. 1959, c. 584.

[25] Stat. 1967, c. 658, § 22, amending Mass. Gen. Laws Ann. c. 117, § 24A (West 1969).

[26] Stat. 1975, c. 618, § 4.

[27] *See* Mass. Gen. Laws Ann. c. 118E, § 6 (West Supp. 1982).

ing in this context, or should summarily reverse to indicate that this case is so clearly on the wrong side of that line as to require no extended debate.

III. The Supreme Judicial Court's Decision that MGH Had Standing to Assert the Federal Constitutional Rights of Arrested Persons to Medical Care Represents an Altogether Inappropriate Resolution of an Important and Recurring Question of Federal Law.

Although indicating that the City of Revere might have waived its right to question the standing of MGH, the court below went on to suggest that MGH in fact had standing to litigate the suspect's Eighth Amendment claim inasmuch as "standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them."[28]

This case is a classic misapplication of that standard. Far from *protecting* the rights to medical care of criminal suspects who could not readily assert such rights themselves, the third-

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[28] Because the court below effectively resolved the standing question, citing *Barrows* v. *Jackson*, 346 U.S. 249 (1953), the issue is properly before this Court. Moreover, review here on the standing issue is appropriate because the views of the court below on standing could well have been influenced by the court's erroneous conception of the underlying substantive constitutional right, discussed in part II, *supra*. That issue is indisputably before this Court. Finally, MGH will presumably renew *in this Court* its claim on behalf of the suspect's constitutional rights. If principles of Article III jurisprudence, including the prudential limits on the assertion of third-party standing in Article III courts, establish that MGH has no standing in a federal court to make such claims on the suspect's behalf, then not even the alleged waiver below could explain a decision by this Court to overlook the clear obstacles to the standing MGH asserts.

party intervention by MGH may *endanger* those very rights — by grounding them in an ill-fitting constitutional source,[29] and by providing an incentive for cities to direct their police to use only publicly controlled hospitals, in order to avoid the sort of liability for which MGH argues here.

The right to medical care that MGH was permitted to champion in its quest for payment was, indeed, not even *jeopardized* by the situation MGH sought to "correct": no suspect in police custody, so far as the record in this case reveals, had been, or *would ever be*, denied needed medical care in Massachusetts because of any hospital's concern for bill collection. Just as Kivlin, the suspect in this case, received from MGH all the medical care he required,[30] so others in his situation stand assured of similar treatment by a combination of laws and regulations governing both police and health-care providers, public and private, in this setting.[31]

Providing nothing beyond a convenient vehicle for MGH (and the state's highest court) to ride in shifting the costs of care to taxpayers, the suspect was more used than served by this derivative assertion of his supposed rights. It is difficult to imagine a more apt illustration of the reasons litigants are not ordinarily awarded standing to complain that others, who have not chosen to sue, are being denied their rights.[32]

Although the plurality opinion in *Singleton* v. *Wulff*[33] found that physicians had standing to assert the rights of women to receive abortions with Medicaid funding, that opinion relied

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[29] *See* Part I *supra*.

[30] *See* note 11 *supra*.

[31] *See* note 12 *supra*.

[32] *See* Stewart, The Reformation of American Administrative Law, 88 *Harv. L. Rev.* 1667, 1732-33, 1736 (1975).

[33] 428 U.S. 106 (1976).

on the fact that the women's rights were in fact threatened.[34] Moreover, Justice Stevens, whose concurrence was necessary to the result in *Singleton*, relied on the fact that the physicians were asserting their own constitutional rights as well as those of third parties.[35] In this case, MGH relies entirely on the constitutional rights of others.

Thus Justice Powell may have been correct in fearing that *Singleton* would send a misleading message, apparently permitting "a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services."[36]

The Court should act to erase the egregious standing error of the court below, and to correct any misimpression that may have been created by its decision in *Singleton*.

Conclusion.

For the foregoing reasons, the City of Boston urges this Court either to grant certiorari or to reverse the judgment below summarily.

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[34] *Id.* at 117 (Blackmun, J., joined by Brennan, White, and Marshall, JJ.) (noting that indigent women cannot easily get abortions without their physicians being paid by the State and, therefore, that the right to receive an abortion was necessarily at stake).

[35] *Id.* at 121-22 (Stevens, J., concurring in part).

[36] *Id.* at 129 (Powell, J., dissenting).